

TOP FIVE 2012

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

DORÉ v BARREAU DU QUÉBEC, 2012 SCC 12

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Facts

Gilles Doré was defense counsel in a criminal proceeding being heard by Justice Boilard of the Superior Court of Quebec. In response to some of Mr. Doré's oral arguments in court, Justice Boilard called him "an insolent lawyer" and suggested he was not representing his client adequately. He made similar comments in his written judgment of the case, referring to Mr. Doré's oral submissions as "totally ridiculous", "bombastic rhetoric and hyperbole", and claiming that Mr. Doré had a "narrow vision of reality" and had done "nothing to help his client discharge his burden." Shortly after leaving the courtroom, Mr. Doré wrote Justice Boilard a private letter in which he called him "pedantic, aggressive and petty", accused him of being "fundamentally unjust" and questioned whether he had sufficient legal knowledge to be a judge.

Code of Ethics of Advocates (Syndic du Barreau du Quebec)

Division 2 - 2.03. The conduct of an advocate must bear the stamp of objectivity, moderation and dignity.

Mr. Doré complained to the Judicial Council of Canada, and Justice Boilard was issued a

reprimand. This was the only punishment the judge received for his actions. Conversely, the Chief Justice of Quebec forwarded Mr. Doré's letter to the Syndic du Barreau du Québec, which handles disciplinary issues with lawyers in the province. The Syndic filed a complaint against Mr. Doré on the grounds that his letter violated article 2.03 of the *Code of Ethics of Advocates* ("Code").

The Disciplinary Council found that Mr. Doré had violated the *Code of Ethics*. Based on his conduct and failure to show remorse, the Council suspended Mr. Doré from the practice of law for 21 days.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;



Mr. Doré appealed the decision to the Tribunal of Professions, claiming that article 2.03 of the *Code* violated his right to freedom of expression under the *Charter*.

Procedural History

The Tribunal found that while the Syndic du Barreau's actions clearly violated Mr. Doré's freedom of expression under s. 2(b) of the *Charter*, this violation was justifiable because lawyers work in a profession that has a special obligation to uphold public confidence in the judicial process. In other words, they have a more limited right to freedom of expression with respect to commentary on their profession than is true of Canadian citizens in general. Upon reviewing the decision, the Superior Court and the Quebec Court of Appeal both concurred with the Tribunal and found that the infringement was justified. Mr. Doré appealed to the Supreme Court of Canada (SCC) on the grounds that the Court of Appeal had erred in determining that the *Oakes* test should not apply in this case.

Issues

Is the *Oakes* test suitable in an administrative law context?

Decision

Mr. Doré's appeal was dismissed unanimously.

Ratio

The SCC considered whether to use the *Oakes* test or a conventional administrative law approach when a lawyer's freedom of expression is violated by sanctions by a professional governing body. The conventional approach gives more leeway to the governing body to determine whether such a violation is reasonable. While *Charter* values should be incorporated into judicial review of administrative decisions, lawyers must be aware that there are limits on their freedom of expression, in regard to expression that would undermine the image of the judiciary.

Reasons

The SCC concurred with prior decisions in finding both that Justice Boilard had treated Mr. Doré unfairly and that the decision of the Tribunal had infringed his freedom of expression. The legal question it faced was how to proceed in deciding whether this infringement was justified.

The Court considered two ways to move forward:

1. It could adopt the *Oakes* framework, which was developed for reviewing legislation rather than administrative decision-making.
2. Alternatively, it could integrate two elements of the *Oakes* test – balance and proportionality – into the administrative law approach, in order to preserve *Charter*



values while maintaining the existing framework.

The Court found that the latter option was appropriate and that a full *Oakes* review would undermine the discretion normally given to administrative decision makers. It ruled that assessing reasonableness be done by focusing on proportionality, which considers whether the interference is “no more than is necessary.” The standard of review is not “correctness,” but rather, whether the decision was “reasonable,” given the skills, expertise, and knowledge of the tribunal. Relying on “correctness” (as in *Oakes*) as the standard of review would be to essentially retry a case.

The SCC then applied the facts of this case to the process it had set out. The specific issue was how to balance the public interest in civility in the legal profession with Mr. Doré’s *Charter* right to freedom of expression and making an open criticism of the judicial process.

The Court found that there is a strong public interest in maintaining faith in the judicial system and that Mr. Doré – and lawyers in general – are aware that there are special constraints on their freedom of expression which limits them from exercising that freedom in a way that tarnishes the public image of the judiciary. Lawyers can make reasonable, legitimate complaints, so long as it is done so with civility. The Court concluded that in light of the excessive bad-mouthing in the letter, the Disciplinary Council’s reprimand

was a reasonable one. Mr. Doré’s displeasure with Justice Boilard was justifiable but the extent of his response was not. The Court did not issue specific guidelines about a more appropriate form, time, place, and manner for expressing criticism, leaving these questions to be settled in the future.

DISCUSSION

1. In your own words, describe why lawyers have less freedom of expression than the general public when they interact with the judiciary. Is this limitation necessary?
2. Should judges be allowed to describe lawyers in the language that Justice Boilard did? Should their freedom of expression be limited in the same way as that of lawyers?
3. Justice Boilard's comments were part of the official record of the case being heard because they were made in court, whereas Mr. Doré's were made in a private letter. Does this affect your impressions of this case?
4. The SCC found that Mr. Doré's displeasure was justifiable. What other means might he have taken to express himself? What would you have done in his place?
5. The *Charter* normally protects individuals against government actions that limit rights and freedoms. In what ways does this case correspond to or differ from normal *Charter* applications?